Google Inc. et al v. Egger et al Doc. 531

United States District Court

Northern District of California

Before The Honorable Vaughn R. Walker

In re: NSA Telecommunications Records Litigation,)

No. MDL 06-1791 VRW

Related To:

No. C06-0672 VRW

San Francisco, California
Tuesday, December 2, 2008

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: Pillsbury Winthrop
50 Fremont Street
San Francisco, California 94105
By: Bruce A. Ericson, Esquire
Marc H. Axelbaum, Esquire

Electronic Frontier Foundation
454 Shotwell Street
San Francisco, California 94110
By: Cindy Ann Cohn, Esquire
Kurt Opsahl, Esquire
Kevin Stuart Bankston, Esquire
James Samuel Tyre, Esquire

(Appearances continued on next page.)

Reported By: ***Sahar McVickar, RPR, CSR No. 12963***
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

Dockets.Justia.com

Appearances, continued:

For Plaintiff: Law Office of Richard Roy Wiebe
425 California Street
San Francisco, California 94104
By: Richard Roy Wiebe, Esquire

Law Office of Lee Tien
1452 Curtis Street
Berkeley, California 94702
By: Lee Tien, Esquire

Law Office of Aram Antaramian
1714 Blake Street
Berkeley, California 94703
By: Aram Vazken Antaramian, Esquire

American Civil Liberties
Union of Illinois
180 North Michigan Avenue, Suite 2300
Chicago, Illinois 60601
By: Harvey M. Grossman, Esquire
Ann Brick, Esquire

Lieff, Cabraser,
Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California 94111
By: Barry R. Himmelstein, Esquire

For Defendant: United States Department of Justice
Federal Programs Branch/Civil Division
20 Massachusetts Avenue NW
Washington, DC 20530
By: Carl J. Nichols, Esquire
Anthony J. Coppolino, Esquire

Williams & Connolly, LLP
725 Twelfth Street NW
Washington, DC 20005
By: John G. Kester, Esquire
George Hicks, Esquire

Sidley Austin, LLP
1501 K Street, Nw
Washington, DC 20005
By: Eric A. Shumsky, Esquire

///

Appearances, continued:

For Defendant: Wilmer Cutler Pickering
Hale and Door, LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
By: Brian M. Boynton, Esquire
Randolph D. Moss, Esquire

---o0o---

December 2, 2008 **10:00 a.m.**

P R O C E E D I N G S

THE CLERK: Calling case MDL No. 06-1791, In re: NSA Telecommunications Records Litigation.

And this relates to 06-0672, Hepting versus AT&T and telecom carrier cases.

Counsel, you can start your appearances, please.

MR. WIEBE: Good morning, Your Honor.

Richard Wiebe for the plaintiffs. And with me at counsel table are Kurt Opsahl --

MR. OPSAHL: Good morning, Your Honor.

MR. WIEBE: Kevin Bankston.

MR. BANKSTON: Good morning, Your Honor.

MR. WIEBE: Cindy Cohn.

MS. COHN: Good morning, Your Honor.

MR. WIEBE: Ann Brick.

MS. BRICK: Good morning, Your Honor.

MR. WIEBE: And Harvey Grossman.

MR. GROSSMAN: Good morning, Your Honor.

THE COURT: Very well. Good morning, Mr. Wiebe.

MR. NICHOLS: Good morning, Your Honor.

Carl Nichols from the Department of Justice on behalf of the United States.

MR. BERENSON: Brad Berenson, Sidley Austin, on behalf of the AT&T, BellSouth and Cingular defendants.

MR. MOSS: Good morning, Your Honor.

Randy Moss on behalf of Verizon. And with me is my colleague, Brian Boynton.

MR. BOYNTON: Good morning, Your Honor.

THE COURT: Let's -- Oh, all right, Mr. Moss, yes.

MR. MOSS: Thank you, Your Honor.

MR. SHUMSKY: Good morning.

Eric Shumsky with Sidley Austin, also with the AT&T BellSouth and Cingular defendants. Good morning.

MR. KESTER: Good morning.

John Kester from Williams & Connolly representing Sprint Nextel.

Your Honor, I would like to introduce my colleague, George Hicks, who is new to the case and will be here this morning.

THE COURT: Very well, good morning.

MR. ERICSON: Good morning, Your Honor.

Bruce Ericson and Mark Axelbaum of Pillsbury Winthrop Shaw Pittman on behalf of the AT&T, BellSouth, and Cingular defendants.

THE COURT: Very well.

MR. COPPOLINO: Good morning, Your Honor.

Anthony Coppolino for the Department of Justice for the United States.

THE COURT: Very well, Mr. Coppolino.

Well, counsel, I'm going to start with Mr. Coppolino, but first let me tell you that I have not read the classified certification. I concluded that I would attempt to see if the public filings would be sufficient to provide guidance to the Court as to how the action should come out, or, at least, this motion should come out, and, if possible, to make a determination without relying upon the classified certification, then I'd proceed in that fashion.

If I conclude that that is not possible, then I'll have to decide exactly what to do with that particular document. But, you should know, at the outset, that what has been filed in the public record is all that I've seen in connection with the present motions, and nothing else.

Now, late yesterday afternoon we sent out to you a series of questions; I hope you've had a chance to review those. Those are not an exhaustive list of all the questions that are on my mind, but I thought it might be helpful to give you some guidance of some of the questions that I do have in my mind.

I don't particularly want go through those one by one and have you address them step -- each one at a time, but these are certainly issues that are on my mind. And, I hope that that will be helpful to you in framing your argument.

Now, let me turn, first, to the moving party.

And Mr. Coppolino, are you or Mr. Nichols going to argue?

MR. NICHOLS: I am.

THE COURT: All right, Mr. Nichols.

MR. NICHOLS: Thank you, Your Honor. Carl Nichols on behalf of the United States.

What we thought we would do is I would take the lead this morning; it is our motion. Plaintiffs, obviously, will have an opportunity to respond. And then, the telecom defendants, if they had anything they might wish to add, we thought that would be more appropriately left for rebuttal, if at all.

And, of course, we did receive those questions, Your Honor, and I will certainly endeavor to answer them as I go through my argument this morning.

Your Honor, Section 802(a) of the FISA Amendments Act of 2008 reflects Congress' considered policy judgment reached after extensive legislative process involving considerable oversight, inquiry, and debate.

THE COURT: Well, let me ask you right at the beginning here: Now, we are going to have a new Attorney General in a relatively short period of time who may or may not take the same position as the present Attorney General; why shouldn't I just wait to see what the new Attorney General does with this issue?

MR. NICHOLS: I think, right now, you have before you a certification and a live motion to dismiss or for summary judgment based on that certification. I think, as this case presently exists, there is a live motion to dismiss.

I think if, for example, the Attorney General later were to withdraw the motion to dismiss or for summary judgment, then that would be a time where, of course, you would not be deciding it. But, I don't think it would be appropriate at this time to wait, Your Honor.

THE COURT: Well, let's assume the Attorney General takes a different position, in whole or in part, from this; by that time, there may be a decision out. And, I gather from the statute whatever I decide is going to the Court of Appeals.

MR. NICHOLS: That's probably the case, Your Honor. I don't speak for the plaintiffs, obviously, on whether they would appeal a grant of our motion, but it's, you know, not a crazy assumption to believe they would take it up to the Ninth Circuit.

THE COURT: Well, there is a provision in the statute which --

MR. NICHOLS: -- which allows interlocutory appeals, that is for sure. Of course, that would be an interlocutory appeal if there is a dismissal. But, if you were to not grant our motion to dismiss, that interlocutory appeal provision would kick in; at that point, the Attorney General would be presented with the determination of whether to continue to press the positions that we are pressing now.

So, I think as this litigation progresses, it's absolutely the case that the next administration will consider whether, and to what extent, to continue taking the positions we've taken.

Having said that, I think it's quite clear that the positions we are taking are very well-founded. The standard for the Department of Justice to decline, for example, to defend the constitutionality of a federal statute is a very high. The department rarely, if ever, declines to defend the constitutionality of federal statutes. And, I think that this --

THE COURT: Well, the interlocutory appeal provision provides that the Court of Appeals shall have jurisdiction of interlocutory orders granting or denied, so --

MR. NICHOLS: It's a bit of an odd way to phrase it because a grant of a motion to dismiss is a final judgment, generally, and so it wouldn't be interlocutory, and the plaintiffs would be able to appeal normally.

I think Congress is being very careful, here, to say if you were denied a motion to dismiss you can take that up -- either grant a motion to dismiss, which really is a final judgment and the plaintiffs could take it up.

I think there's no question under 802(f) that whichever way Your Honor goes on the motion to dismiss, the parties could appeal that determination. And, my point is, at that point, for example, if Your Honor were to either grant the motion to dismiss or deny the motion to dismiss in December, January, February, if there is an appeal, the next administration will, of course, have to decide whether and to what extent it is going to continue to press the exact same arguments that we are making here.

The corollary point that I was also making, Your Honor, is particularly on the constitutional arguments, there is a very high bar for the Department of Justice to not defend the constitutionality of federal statutes, as you know. And, we think that this statute is so within the heartland of a plainly constitutional statute, plainly constitutional exercise of Congress' Article 1 authority, that it would be very, very unlikely for any future Department of Justice to decline to defend the constitutionality of this statute.

And that's because, Your Honor --

THE COURT: Well, let's take that up for a moment. And, we may come back to this issue of interlocutory appeals, but you characterize this statute as "within the heartland"; well, what other statute is there that's quite like this statute?

MR. NICHOLS: Well, I realize --

THE COURT: Are you telling me there is another statute that has all the features that this statute does?

MR. NICHOLS: I think your question, too, reflects that -- that --

THE COURT: Well, one of these questions certainly --

MR. NICHOLS: Yes.

THE COURT: -- does that.

MR. NICHOLS: But, I think it's important to separate out the various things that the statute does and the various constitutional arguments that plaintiffs are making because --

THE COURT: Before you do that, tell me what statute is analogous to this one.

MR. NICHOLS: I don't think that there is a perfectly analogous statute that precisely has every single element of this statute.

THE COURT: So, this statute is kind of sui generis, is it?

MR. NICHOLS: I think it's Congress' response to a sui generis set of cases where post-911, which is a sui generis event, there are lawsuits, attack on the homeland by terrorists, after which the Government has to engage in a variety of activities to defend and protect the homeland; lawsuits that then are brought against private parties for allegedly participating with the United States, and then, in which the Government asserts the State Secrets privilege.

There aren't very many cases like that.

Congress then undertakes a very robust oversight legislative process and decides the appropriate way to deal with these cases is to create a statute that does two things: First, substantively, it creates a set of defenses or immunities -- actually, I don't think it really matters how you look at them, what is important is that Congress says no cause of action shall lie against a telecommunications carrier if one or more of the provisions of Section 802(a) are met. Consider that to be a substantive change.

Congress also decides that it needs to create a procedural mechanism for allowing the Court to review whether those circumstances are met while also protecting national security. And so, what it does in the remainder of Section 802 is it authorizes the Attorney General to disclose to this Court ex parte and in camera information establishing that those prohibitions of 802 are met and allows this Court to review that information, ex parte and in camera, and make a determination, based on your view of that information, whether or not those provisions are met.

THE COURT: It does something -- 802 does something more than that, doesn't it? It allows the Attorney General to tell the Court whether the requirements of 802(a) are met or not met, because we have a paragraph, or sub-paragraph 5 of 802(a), in which the Attorney General can tell the Court the person did not provide the alleged assistance.

MR. NICHOLS: Yes.

THE COURT: Now, what, in essence, that does is to give the Attorney General carte blanche to immunize anyone who, in his judgment or view, should be immunized from possible liability here.

MR. NICHOLS: I don't think that's right, Your Honor. And, I think it's important to step back and think about why --

THE COURT: Why do we have this provision in there? What does this provision do?

MR. NICHOLS: 802(a)(5) was designed for the following problem: If you don't have a provision in the statute that gives the Attorney General the option of certifying that one of five things is true, one of which is non-participation, non-assistance, then the situation you would have had, if you only had 802(a)1 through 4, is, if the Attorney General certified that a particular claim fell within 802(a)1 through 4, that certification itself would confirm both the fact of the activity, whatever the underlying activity is, and the fact of participation by the carrier.

So, you needed to have 802(a)5 in there, so that when the Attorney General certifies, on the public record, that one of the provisions of 802(a)1 through 5 has been met, that certification on the public record doesn't confirm or deny an activity or participation by a particular carrier. It's a very important part of this statutory scheme, Your Honor.

I mean, put differently, if, for example, there was a lawsuit against telecom company A for activity Y, and the Attorney General -- and that activity had occurred, and it was pursuant to one of the provisions set forth in 1 through 4, call it a FISA court order, but there you had no (a)(5), the only way the Attorney General could certify publicly would be to say, I hereby certify that (a)(1) through (a)(4), one of those provisions is met.

That certification would necessarily carry with it the implication that the alleged activity had occurred because that has to be true of (a)(1) through (4), and that the assistance had been granted by the telecom carrier. So, the Attorney General would be forced to invoke the certification procedures, but, in doing so, risk disclosing the fact of assistance and the fact of an activity.

THE COURT: But (5) could also be invoked in a situation in which there had been no request for assistance, in a situation in which no assistance had been rendered, and, presumably, in a situation in which (a)(1) through (4) existed for part of the activity, but not for other activity.

MR. NICHOLS: I'm -- look, let me -- I think I understand where you're going with this, but let me just --

THE COURT: Well, all right, let me --

MR. NICHOLS: Yeah.

THE COURT: -- ask it another way.

MR. NICHOLS: Yeah.

THE COURT: -- or other aspect of the question: (a)(1) through (4) provides immunity to a carrier or to a person, a person who has provided assistance, but the person afforded immunity under (a)(5) need not have done anything. So, in essence, the Government is providing immunity to somebody who has provided no assistance to the Government.

MR. NICHOLS: That's right.

THE COURT: Now, what kind of precedent is there for providing a governmental immunity to a party that has essentially done nothing to earn it?

MR. NICHOLS: Well, it's not that they haven't done anything to earn it, it's actually that they haven't done anything to create liability in the first place.

I think that's reflected in one of your questions, which is, if you invoke (a)(5) for a carrier that did nothing, which is by definition when (a)(5) applies, provided no assistance, plaintiffs have no claim to start with.

But let me back up to your question, and that's the following: Imagine an allegation against Your Honor or a prosecutor that alleges that you took some act that harmed some individual, and let's assume, again, that you didn't actually take that act: You still have absolute immunity, assuming the allegations are that it was done in a judicial role. Same with a prosecutor. So, immunities kick in a lot of times regardless of whether or not you actually engaged in the activity alleged by the plaintiff.

Here, (a)(5) only kicks in if the Attorney General certifies under oath, in writing, that the telecom company that's been sued and is alleged to have provided assistance to the Government did not, in fact, provide the assistance.

That is about the clearest time that you would want a defense or an immunity to kick in, because they would not have been line in the first place and absent this procedural mechanism for ensuring that a lawsuit like that does not get litigated.

Go back to my hypothetical, for example: Let's assume now that plaintiff alleges that telecom company A provided assistance to the Government of kind B and it actually didn't occur; normally, the Government would have to say publicly either we don't engage in that activity, people may think we engage in that activity, people may think that we have that capability, but we don't engage in that activity, or we do engage in the activity, but we don't do it with that carrier. Well, disclosing that information harms national security, as we've said throughout this litigation, because you are identifying activities that the Government can or cannot do, or capabilities that the Government does or does not have, and the partners that the Government does or does not have.

And, what this provision allows, in that hypothetical soup, is for the Government to say we certify that one of the provisions, (a)(1) through (a)(5) is met here, and, in the classified submission, to make clear to Your Honor that it's (a)(5) because the activity or the assistance did not occur.

And so, (a)(5) is an integral part of this because it precludes the Government from having to invoke these protections in a way that discloses more information on the public record than currently exists.

THE COURT: And, what is the substantial evidence that the Attorney General has to present that (a)(5) has been satisfied?

MR. NICHOLS: I think it's a sworn declaration from the nation's senior legal official that the activity didn't occur, or the assistance was not provided. And, I think that is -- if and when you review our classified submission, you would see that the Attorney General goes into great detail in explaining what did or did not happen, what carriers may or may not have provided assistance. All of that is in a sworn declaration, under penalty of perjury. I think that's enough.

If Your Honor thinks more is necessary, in some respects this is proving a negative, and one way to tend to prove that a negative is true is to talk about what did happen.

And so, what we've tried to do in our classified certification, and I know you haven't reviewed it and I can't say very much about it on the public record, is to both give you sworn testimony about what did not occur and then sworn testimony about what did occur, the implication of which is we've given you the entire picture, and so, therefore, there is substantial evidence about non-participation.

And, I certainly think that under any relevant standard that might apply, the Attorney General's certification, in this case, establishes beyond any doubt either that as to those carriers for which an (a)(5) certification has been made in the classified declaration that there was not such assistance as to whatever allegation we are talking about, and, as to those who may have provided assistance, that the assistance was provided pursuant to a request, in writing, of the kinds delineated in (a)(1) through (a)(4).

So, I understand Your Honor's questions about (a)(5), but, I think it is both -- the least problematic of these provisions, because if a carrier didn't provide assistance at all, the plaintiffs have no claim.

THE COURT: There's no need for immunity, is there?

MR. NICHOLS: Well, but that assumes that this is an immunity. I mean, one could also look at it as it's a defense; we didn't do it, but it's something that can't be said on the public record, because of harm in national security because we don't want to be confirming or denying whether activities happened or not or assistance happened or not. So (a)(5) is both the least problematic of the provisions, but it's also a very integral part of this procedural framework.

THE COURT: I don't know how helpful it is to try to pigeonhole this provision as an immunity or a defense, but, it really does resemble an immunity much more than an affirmative defense, does it not?

MR. NICHOLS: Well, I mean, I think in some respects that is a bit of semantics because there are immunities that end up looking a lot like defenses. I mean, one asserts qualified immunity as a defense to a suit. On the other hand, there are other immunities that I would consider to be more absolute, absolute judicial immunity, which is more of an immunity from suit. Maybe it's a little bit less like a defense.

Either way, I think the operative question is how does the statute operate? The statute says no cause of action shall lie against the carrier if one of the provisions of Section 802(a) is met. Whether you consider that a defense, or whether you consider it immunity, I don't think it's relevant for any of the constitutional issues that have you have before you. That statute operates to preclude civil actions and civil liability against carriers if the statute has been met and, of course, if the statute is constitutional.

Umm, part of your question in -- in Question No. 2 -- gets to the issue of the statute that precludes constitutional claims against carriers, and I think that's plaintiff's lead argument in their briefs, and I would like to spend a little bit of time on that question.

It is the case that if the statute applies, it would preclude claims against the telecom carriers that allege Bivens damages actions, for example. But, we think that's perfectly constitutional and within Congress' Article 1 power to do so for one very important reason: And, another question that Your Honor has asked recognized, this statute leaves entirely unaffected the claims: Bivens claims, injunctive relief claims, declaratory relief claims against the Government and Government officials.

Your Honor has a whole set of cases: The Jewel case, the Al-Haramain case, the CCR case, the Schubert case, where plaintiff are pursuing claims against the Government and Government officials; those claims are entirely unaffected by the statute. All Congress has said is no constitutional claims against private entities.

Now, the plaintiffs come back and say that's unconstitutional, but I think it's quite plain Congress has that authority. And, one need look no further than the cases where the Supreme Court has declined to recognize Bivens remedies, even against Government employees, by implication from Congressional statutes.

Part of the Bivens analysis and whether you are going to recognize a Bivens damages action against a federal employee is to look at whether Congress had an intent to foreclose a Bivens damages action; well, you know, embedded in that analysis is the notion that Congress can effect or strip away Bivens remedies, even by implication.

But, this statute isn't implication, this is an express Congressional determination that you shouldn't have constitutional claims litigated against telecom companies, but you should have constitutional claims litigated against the Government. And, I think under any relevant analysis of the case law, that is plainly within Congress' Article 1 power.

THE COURT: That does sound like an immunity, doesn't it?

MR. NICHOLS: Again, I'm happy to describe it as immunity or a defense. I think it's just as relevant to talk about what the statute does; it operates to foreclose all claims, statutory common law, or constitutional, against the carriers. But, however one describes it, immunity or defense or some other articulated standard, it's wholly constitutional for Congress to have decided to make that policy judgment where the Government remains a viable defendant under a statute that doesn't affect claims against the Government.

THE COURT: Are you suggesting that if the Government had not left the claims against it intact, then the statute could not be constitutional?

MR. NICHOLS: I think you would have a very different statute if, for example, Congress said you can't ever bring an injunctive relief constitutional claim against any party relating to these cases. I think the Supreme Court would be very wary of a statute that foreclosed any constitutional claims against any party for injunctive relief because I think there is a -- there is some line of authority for the proposition that at least injunctive relief is necessary to pursue constitutional claims.

Of course, in -- ***Larson*** and other cases make clear that the Government can pursue such injunctive relief against the Government. And, I think the statute that foreclosed that kind of relief against the Government would have significant constitutional concerns that are clearly not present here, because those claims remain completely unaffected by the statute.

Your Honor, you -- you also asked a question about retroactivity. The statute is retroactive in the sense that it does have an effect on claims litigating alleged past conduct. But, under all the relevant Supreme Court cases and Ninth Circuit cases applying ***Klein*** and ***Plout***, it's quite clear that this Court constitutionally may apply pending law, the current law embodied in the statute to claims that have not yet gone to final judgment.

If the plaintiffs had a judgment that had gone final, and all appeals had been exhausted, and the like, there would be a ***Plout*** problem, potentially. But, that's not what we have here. You have a live case in which all the cases make clear you apply the current law which is embodied in 802.

Umm, finally, Your Honor, you talked about, or your second question talked about the Attorney General's discretion, and we talked about that a fair amount already in the context of 802(a)(5), and I think it's important to remember where 802(a)(5) fits into the entire scheme, but this notion, that the plaintiffs suggests, that the Attorney General is exercising legislative power in derogation of Article 1 by submitting to you the facts the support the contention that 802(a) applies is, I think, quite wrong.

The Attorney General is not exercising legislative power here. Congress has changed the law. It's a duly enacted statute by presentment signed by the president exactly how the constitution has to work. Nothing the Attorney General can do would eliminate a provision of the statute, as in the ***Line Item Veto*** case, or otherwise make a statute, not otherwise exist or have a force of law.

The law is, as Congress has said, it is -- all the Attorney General is doing here is exercising a traditional

Executive Branch function of giving the Court information which is within its control to satisfy the standards of 802(a). The Attorney General, in that sense, is acting very much like a prosecutor typically does. There is discretion in bringing cases.

And, to the extent that Your Honor wanted to look for an analog where acts by the Executive Branch can affect the law in pending cases between other parties in a way that might require dismissal, I suggest that the Court might want to look at head-of-state immunity cases, diplomatic immunity cases, where cases pending between private individuals are very much affected by the Executive Branch's determination that one of the parties is immune, either because of head of state or has some sort of diplomatic immunity.

Whether or not to assert that immunity is well within the discretion of the Executive Branch and, frankly, is unreviewable, unlike what we have here, where the Attorney General is presenting information to the Court, but under Section 802(b) and the rest of Section 802, the Court plays a role in reviewing whether the Attorney General has established facts sufficient to show that 802 applies.

So, if anything, this case is much less problematic or does not raise any constitutional concerns because it's actually more within the heartland of what Congress can do, than, for example, those head of state cases.

Those are really plaintiff's core Separation of Powers arguments. And, unless Your Honor has more questions about them, I'd be happy to turn to their due process argument.

THE COURT: All right.

MR. NICHOLS: Their due process argument really turns on, I think, the confluence of two things: One is the facts that we can submit. Congress has made clear that we can submit to Your Honor, ex parte and in camera, and Your Honor can review, ex parte and in camera, and rely on the information we provided to you in making determinations information establishing that Section 802(a) has been met.

Plaintiffs say that violates due process, but their reply brief, or sur-reply brief, ignores the various cases that we and the telecom companies have cited in the IEEPA and AEDPA contexts that say it's not a violation of due process to submit in camera ex parte classified information for merits determinations.

So, there is a long line of cases permitting ex parte in camera review as constitutional under the due process clause. But those cases are, if anything, harder for the Government than this one. In those cases, the interest asserted by the group that's been designated under the statute are very, very -- I mean, they are choate property or liberty interests. A blocking order, under one of those statutes, blocks funds, prohibits people from traveling, prohibits others from providing material support to an organization. It has all sorts of effects on liberty and property interests.

In contrast here, plaintiffs, at best, have what the Ninth Circuit has recognized as a very inchoate interest in a cause of action that is dependent on, among other things, Congressional statutes, how a case might be litigated. And unless and until there is a final judgment, they don't have a true choate property interest in a cause of action.

So, on the one side of the Matthews balancing test, the due process balancing test, you have property interests which are much less important, I would say, than the property interest at issue in the IEPA context.

On the other side of the balance you have the same concern, which is the harm to national security from disclosing this information publicly. There is a ton of case law, Your Honor, recognizing that probably the primarily Government interest is protecting the national security. And, what Congress did here is recognize that it wanted to allow some judicial review of the certification, but it wanted to do so in a way that protected national security. And, as our briefs, I think, establish, Congress struck the appropriate balance.

Plaintiffs' other argument is that the substantial evidence standard either is a ***Klein*** problem, and we think that's quite clearly wrong. Under ***Klein***, the one thing that Congress can't do is it can't direct Your Honor to make specific findings of fact. There is no question that under the statute you are not required to make specific findings of fact, you have to review the classified submission, public submission, public briefs, to determine whether the provisions of section 802(a) have been satisfied.

Plaintiff's other argument is the substantial evidence is standard, is too deferential, and there is a risk of deprivation of -- or an error by Your Honor because of the deference that you to have give, or the lower standard of proof that has to be met here. And, I think there are a couple of points to make, Your Honor.

The first is, obviously, substantial evidence standard has a long history. It's been long recognized that courts reviewing evidence under the substantial evidence standard do not act in derogation of judicial duties. There is no due process violation inherent in the substantial evidence standard.

The second point is, there are very good reasons to have the substantial evidence standard here. As one of your questions indicated, under section 802(a)(4), one of the showings that the Attorney General must make is that the assistance was in connection with an intelligence activity that was designed to detect or prevent a terrorist attack. So, assuming that the Attorney General has certified some of the alleged assistance here as falling within 802(a)(4), and I say "assuming," because the Attorney General has not said publicly whether that is a provision on which he relies, but if he were to make an 802(a)(4) certification in this case, he would have to establish that the alleged assistance was in connection with an intelligence activity of the United States that was designed to detect or prevent a terrorist attack.

But, that is exactly the kind of Executive Branch determination that courts typically give the utmost deference to, either in the State Secrets context or other contexts. And so Congress was quite right, I think, to include the substantial evidence standard.

I don't think it would be appropriate for this Court to look back and second-guess the Executive Branch's determination in 2001, 2002, 2003, that a particular activity might have been designed to protect or detect -- prevent or detect against terrorist attacks. So, I think the substantial evidence standard here quite plainly fits within due process.

There is a related point, Your Honor, and I think plaintiffs, because they realize that substantial evidence is constitutional, they say, but wait a second, this is a different case. That may be true in some cases, but here the Attorney General has an actual bias.

THE COURT: An actual what, sir?

MR. NICHOLS: Bias, b-i-a-s.

And, they don't actually point to anything establishing an actual bias, what they point to is alleged institutional biases that the Attorney General took policy positions on the appropriateness of legislation, and, therefore, when he submits facts to Your Honor, he has a bias in favor of certain facts. I think the case law is quite clear that such institutional bias claims don't work. The Ninth Circuit and the Supreme Court has made clear that the touchstone of bias, even in an adjudicative setting, is financial or personal interest. Plaintiffs acknowledge that the Attorney General doesn't have a personal or financial interest in these cases, and so that bias argument, I think, fails, Your Honor.

If I could mention just two things, and then I'd be happy to hear other questions. And I also want to make sure that I've answered all your -- the questions that you gave us. Plaintiff's view of discovery is quite remarkable. Plaintiffs say we should be permitted to test the Attorney General's certification of highly classified national security information by deposing this Attorney General, the former Attorney General, Secretary Chertoff, and a whole host of incredibly senior-ranking Government officials; that argument is so plainly inconsistent with the statute.

What Congress wanted to do here was to create a mechanism whereby Your Honor receives certain information, information delineated in the statute to determine whether the provisions of Section 802(a) have been met. It did not authorize discovery. And, it expressly authorized Your Honor to review the information contained in the Government's submission.

Your Honor, I think it's important to remember that this was, in some respects, a response to these cases. Congress recognized that these cases created a risk, a harm to national security, and a risk of harm to whatever relationships may have existed between the United States and telecommunication carriers.

Now, what Congress did is it created a focused immunity, a focused defense, whatever one wants to call it embodied in 802(a). It then created a very robust, but still protective of national security procedure in 802(b) and the rest to ensure that this Court had more of a role in reviewing the certification than the Court would have had under the State Secrets privilege, which is where these cases, as you know, were headed.

THE COURT: The statute isn't quite that limited, is it? It speaks about assistance; it can be any kind of assistance by a person. It doesn't have to be a telecommunication carrier.

MR. NICHOLS: Well, it defines "person" as telecommunication carrier or their landlords. That is in the definitional aspect of Section 802 -- sorry, Section 801. So the section, is, in fact, limited to telecommunications carriers, their affiliates, and their landlords.

So the statute is directed at --

THE COURT: And a whole host of others that are defined in the section.

MR. NICHOLS: Well, but they all are related to a telecommunications carrier. And, I think the goal there was to ensure that, on the one hand, you ensured that telecommunication carriers had the benefit of 802(a), but some affiliate of AT&T or some executive of AT&T wasn't left hanging, so they defined the term to include any possible person affiliated with a telecom carrier.

THE COURT: "Other person who may be authorized or required to furnish assistance," and so on and so forth. It's -- it's awfully broad.

MR. NICHOLS: Your Honor, I disagree in that respect. I think Congress' intent was to make this statute about telecommunications providers, but they wanted to make sure the definition wasn't so narrow that one couldn't certify that an affiliate or, you know, a senior vice president of a company or a member of the board wasn't subject to dismissal because of the certification.

So, I actually do think that the immunity, whether it's 1 through 4 or 5, and whether you describe it as immunity or defense, is, in fact, quite narrow, and is well within

Congress' Article 1 powers.

But, I think it's also important to recognize that that's the substantive provision. And then, the question is whether Congress appropriately balanced the various competing interests in creating the procedure that you have to follow in applying the Act. I do think it's important to keep those two parts of the statute separate, and I think both parts are plainly constitutional.

Umm, Your Honor, that's a question of whether the statute is constitutional. Obviously, we think it is for all these reasons. If you agree, of course, then there is the question of whether the Attorney General's certification establishes that the provision of 802(a)(5) have been met, essentially the application of those standards to the Attorney General's classified certification.

I recognize Your Honor hasn't reviewed that yet. I think you may for the reasons we discussed, and I think when you do you will see --

THE COURT: So what do you think the next step is?

MR. NICHOLS: I think the next step is for Your Honor to review the classified certification because you have determined it would be appropriate to do so, consistent with due process and authorized by Congress, to review that certification and any supporting materials that we may have provided in connection with that certification, as delineated by Section 802, that there are certain things that authorize the Court to review in connection with the certification; review the materials that we have provided to the Court, and, in my view, when the Court reviews those materials, it will see that there is no doubt that the Attorney General certification establishes beyond any doubt that the certifications that he makes in there are supported by substantial evidence, a preponderance, whatever standard one wants to pick, that the certification establishes that the provisions of 802(a) have been met.

THE COURT: And what do I do if I conclude that there is not substantial evidence?

MR. NICHOLS: If you conclude there is not substantial evidence, as we suggested in our brief, we think the appropriate course is for Your Honor to come back to us to ask questions of us as to why --

THE COURT: Ex parte?

MR. NICHOLS: Yes, if it involves classified information.

Congress made quite clear in multiple provisions in this statute that the one thing that could not occur is the disclosure of classified information to the plaintiffs. I think it would be completely appropriate, and the Court should give notice to the other side that it was asking questions. That's exactly what Judge Canelli did in the ***Terkel*** case, which is an early State Secrets case that was paralleling the Hepting case. Judge Canelli in the State Secrets context gave notice to the plaintiffs that he had some questions for us, he asked some questions of us --

THE COURT: And did he specify what those questions were?

MR. NICHOLS: He did not specify what the questions were, because to specify what the questions were would have been to disclose classified information.

So, he gave notice he was asking the questions, he then asked those questions of the Government. They are the kinds of questions that one could ask without revealing classified information, so it was quite appropriate, in our view, that he did that ex parte and in camera.

The Government responded to those questions. We actually had a bit of a back and forth about those questions, and he, ultimately, as you know, granted the motion to dismiss based on the Government's assertion of the State Secrets privilege.

My view, our view, Your Honor, is that dialogue will not be necessary here because the Attorney General's certification is robust and establishes beyond any doubt that the certification establishes Section 802(a) applies here. But, if you don't agree for some reason, we think that the course that Judge Canelli took in ***Terkle*** is the appropriate one, which is to come back to us, ask questions, give notice to the other side that you are doing so, but, of course, not disclose to the other side the questions you are asking because that would be to disclose classified information.

If you have questions, of course, like the questions you asked today that go more to legal issues there would be no problem providing the other side with that, but, to the extent that they are bound up in classified information, we think it would be inappropriate to disclose those to the other side.

If Your Honor has no further questions -- I hope I've answered all these questions. If not, I will try to do so later in the hearing, if appropriate.

THE COURT: Thank you, Mr. Nichols.

Mr. Wiebe, are you going to be arguing for the plaintiffs?

MR. WIEBE: Yes, I am, Your Honor.

THE COURT: All right.

MR. WIEBE: Good morning, Your Honor.

I would like to begin where Mr. Nichols ended up, and that's with the due process flaws of this statute. As Your Honor knows, we have pointed out numerous constitutional flaws with Section 802, and one of the most fundamental is the due process violation of that statute. Under that statute, plaintiffs never get the opportunity for a de novo adversary hearing, either before the Attorney General or before this

Court.

We never got to see the secret evidence arrayed against us --

THE COURT: Well, Mr. Nichols tells me that that's not unprecedented, that in the situations which he just described, that's the way this process works, and it's still considered due process.

MR. WIEBE: I don't believe that's correct. I think if you look at -- at the situations where the substantial evidence test is applied, uniformly, you'll find that there has always been a prior de novo adversary adjudication.

For example --

THE COURT: What do you mean --

MR. WIEBE: I mean --

THE COURT: -- de novo?

MR. WIEBE: A case where the party against whom the decision is being made has the opportunity to present evidence to the decision maker, to see the evidence presented against the party.

For example, one of the situations they rely on is court review of administrative proceedings, including administrative proceedings designating terrorist organizations; well, in those situations there is an administrative -- before it gets to court, there is a prior administrative proceeding, the person has notice of it, they have the opportunity to present evidence to the administrator, and that administrator then makes a determination.

Here, we have no notice of the Attorney General's decision; we have no opportunity to present evidence contesting it. So, that was not an adversary adjudication.

When it gets to court here, it's not a de novo adversary adjudication because this Court's hands are tied by the substantial evidence standard, which is a differential standard of review, not a standard of proof.

So, this Court, even if it were to come to a different decision reviewing the evidence de novo, is, nonetheless, bound by the Attorney General's determination so long as there's more than a mere scintilla with less than a preponderance of evidence supporting it.

So I think that's what really distinguishes --

THE COURT: Well, but isn't that the appropriate testing situation like this, where the determination is one that is not one typically committed to a judicial body, but to an executive body?

MR. WIEBE: I think -- I don't believe that's correct, Your Honor. The decision whether or not to dismiss pending litigation is one that's always submitted to --

THE COURT: Well, but the underlying issue is whether or not the assistance described in 802 has been provided and, whether or not there was reason to believe that the various provisions, particularly A through 4, were satisfied in providing that assistance.

That really is something that resembles a review of an administrative or executive kind of decision much more than a typical fact finding that a court does.

MR. WIEBE: Again, Your Honor, I think you'll find that in those reviews, administrative decisions, there's been a prior de novo determination. I think that's what ***Concrete Pipe*** illustrates, one of the cases we cite in our decision that --

THE COURT: Tell me about that case.

MR. WIEBE: Yeah. That was a case, an ERISA case where the ERISA trustee made a benefit determination, and it then went to an arbitrator. And the issue was, is the -- is the arbitrator bound by the trustee's determination? And the Court held, no, the arbitrator isn't and, under due process, can't be, because the arbitrator was a biased adjudicator and hadn't -- hadn't provided an unbiased de novo adversary adjudication of the matter.

And the same is true here. Here we've got a situation where the Attorney General is a biased decision maker. And, contrary to what Mr. Nichols has said, he was not merely opining on the abstract proposition of whether, in general, immunity for telecom carriers was appropriate. He was saying these very cases, our very cases, should be dismissed, and we cite to that in our summary of evidence and in our briefs. And we never received that de novo adjudication, adversary adjudication. And, at some point, that's got to -- that's got to exist.

THE COURT: What are the -- what are the facts that must be shown to satisfy this substantial evidence standard in 802? One of the questions that I posed, I didn't discuss this with Mr. Nickels, perhaps I should have, is whether that substantial evidence standard is the same under 802(a), particularly (a)(4), as under Section 1804 of Title 50, which is the FISA provision.

MR. WIEBE: Yes, Your Honor.

THE COURT: What -- what is the standard that -- or the facts that need to be shown to satisfy the substantial evidence standard under 802(a)(4).

MR. WIEBE: Okay.

THE COURT: Are they the same as 1804?

MR. WIEBE: No, Your Honor, I don't believe so.

THE COURT: Why not?

MR. WIEBE: 1804 is an instance of what I was referring to, a court making a de novo determination. The Attorney General submits, and is required to submit, extensive detailed very specific evidence about the proposed surveillance, the target of the surveillance, the minimization procedures, if there's more than one surveillance device, additional requirements kick in. Very detailed. And that's --

that's the Attorney General's initial burden.

But then, it's the court, the FISA court, that has the power to make an independent de novo determination of whether that evidence has satisfied the probable cause standard.

Here -- and that's what Congress does when it wants to make a serious attempt to protect the privacy of Americans, to honor constitutional rights and enforce those constitutional rights.

Here, I think it's really too much to try to pack in all that -- very specific requirements into Section 1802. Part of it is that this Court is bound by standard of review; it's not free to make de novo determinations.

The additional part is -- is that the whole purpose of 802, especially A, 4, is not to authorize or immunize only surveillance, which would have been legal, had they gone to the FISA court; it's, rather, to immunize untargeted mass warrantless surveillance. And, I think that's a fundamental different purpose from the purpose that Congress had in 804 -- I'm sorry, 1804.

THE COURT: 1804, yeah.

Well, let me -- let me switch the ground, if you don't mind.

MR. WIEBE: Certainly, Your Honor.

THE COURT: What's the harm here to the plaintiffs?

The plaintiffs still have a remedy against the Government, it just, under this statute the plaintiffs are not able to go against the telecommunications carriers and all of the individuals that are mentioned in 1801 -- I'm sorry, 801.

In other words, the Government has assumed the liability, if there is any, for any of these unconstitutional or unlawful acts, and so, the plaintiffs are going to be made whole if they have, in fact, been damaged. So what's the harm?

MR. WIEBE: First of all, Your Honor, Your Honor has -- has described what I think it would be a substitution statute, and -- in which the Government would step into the shoes of the carriers, and that's not at all what 802 is.

THE COURT: Well --

MR. WIEBE: The Government is not assuming the liability of the carriers. Any action the plaintiffs were to bring against the Government would be subject to all the defenses and immunities the Government itself possesses.

But, I think there's a more fundamental reason why it's absolutely crucial that these --

THE COURT: Well, are you saying that the Government would have some immunities or defenses which would not be available to the telecommunications carriers in the event this statute were not in play?

MR. WIEBE: Certainly, different immunities and defenses.

THE COURT: And, immunities which would cut off relief that the plaintiffs would otherwise be able to obtain; is that what you're saying?

MR. WIEBE: It will certainly -- I think the crucial factor is, we will not be able to obtain relief directly against the carriers because they are no longer the parties. And I think that's --

THE COURT: But, will you not be able to obtain all the relief that you would be entitled to obtain against the carriers, but you would be going against the Government instead.

MR. WIEBE: I don't think that that's an adequate substitute, and let me explain why, Your Honor. It has to do with the special nature of electronic surveillance.

Now, unlike many other constitutional violations, where the participation of a private party is not necessary or essential to the commission of the constitutional violations, with respect to electronic surveillance, it's different. The participation of the carriers is essential in order to complete the constitutional violation. Without their participation and cooperation, it can't happen.

The carriers are the gatekeepers. Without their participation, it just isn't going to go forward. And that's why it's important that, in order to protect the privacy of Americans, there be a remedy directly against the carriers.

What we've seen is that this is an administration that has probably boasted that its Article 2 powers are preeminent, that it's not bound by the other branches in conducting surveillance. It disregarded Congress' commands in FISA for many years; there is no guarantee that it would obey the commands of the Judicial Branch. And, I think that, in fact, a remedy against the carriers would be much more efficacious than a remedy against --

THE COURT: Well, but that's a policy argument, and that's argument you should have been making in Congress. Congress made a determination that that was not in the national interest and gave us this statute.

MR. WIEBE: In fact, Your Honor --

THE COURT: I'm the wrong person to be making that argument to. Talk to Senator Feinstein.

MR. WIEBE: Well, your question, Your Honor, was, was there harm to us, and that's the answer I was -- that's question I was answering by giving that answer and explaining that there is a harm, there is a difference to losing our claims against the carriers.

I'd also, with respect, like to disagree with the notion that Mr. Nichols had advanced, that this is really Congress' determination. And this gets to our Separation of Powers argument.

And, I think that, as the Court has pointed out, this is a very sui generis statute. And, the only branch that has the power to kill our statutory claims is the branch that created them, Congress. Congress didn't do that here. If Congress had done that here, they would have passed a statute like the gun manufacturers' liability statute that the parties brief in the -- both the carriers in the Government brief and we quote in our reply brief.

THE COURT: Is this the --

MR. WIEBE: It's 15 U.S.C. 7902.

THE COURT: The statute that was cited by the law professors, the Protection of Lawful Commerce Act?

MR. WIEBE: Yes, it was also cited by the amicii professors.

THE COURT: Right.

MR. WIEBE: And, it's also addressed in a Second Circuit decision in ***City of New York versus Beretta*** case.

And that's a case where Congress did make the decision, we want to get rid of these causes of action, and the statute says it very baldly: Qualified civil liability action, which is an action against a gun manufacturer, may not be brought in any Federal or State Court. Congress could have done that here, it didn't. Congress, instead --

THE COURT: You wouldn't have liked that any better than this statute.

(Laughter.)

MR. WIEBE: We wouldn't have liked it any better, but it would have -- it doesn't present the same constitutional flaw under Article 1, Section 7, that this one does.

THE COURT: Well, I haven't really read this case. I've glanced at it and glanced at the statute, but that's all. But, this statute appears to go even further than, say, than the statute that we're dealing with here, doesn't it?

MR. WIEBE: The significance of that statute is, that's Congress clearly and unequivocally changing the law, making the policy determination that cases should go -- should not go forward. That's not what we have here. Here, Congress has said these cases are out there, we don't know what to do about it.

THE COURT: And you're saying --

MR. WIEBE: And they punted it to the Attorney General.

Sorry.

THE COURT: What you're saying is Congress, in this statute, is dictating to the Judicial Branch how the Judicial Branch must decide these cases; is that your point?

MR. WIEBE: In the gun manufacturers', Your Honor?

THE COURT: No, in this case.

MR. WIEBE: No, that Congress is giving the Attorney General the power to dictate to this Court whether or not these cases should go forward.

The day after this statute was passed our -- our cases continued to be governed by the law that existed the day before it was passed. And, they would continue to be governed by that today had the Attorney General not filed a certification.

The Attorney General had no duty, under the statute, to investigate whether any of the five conditions in (a)(1) through (a)(5) exist. Even if he does investigate and does determine that one of those circumstances exists, he has no duty to file a certification, no standard to apply to decide whether or not to file a certification, absolute unreviewed, uncabinned, standardless discretion.

And this is Congress saying we don't know what to do, Attorney General, you make up the law, you decide whether our existing laws should apply to these cases or that they should be repealed with respect to these cases and new laws should apply.

THE COURT: Well, how would the statute, in your view, have been less problematic if Congress had dictated to the Attorney General that he must file the certification called for in 802(a)?

MR. WIEBE: It would -- I'm not sure that would cure it entirely, but it would be less problematic, in the sense that Congress would be making the decision; Congress would be making the law.

Here, it's -- it's like the statute in ***Clinton***, Your Honor. Now, in that case -- that's the line item veto case.

THE COURT: Right.

MR. WIEBE: And the Supreme Court there had -- one of the arguments made by the Government in defense of the line item veto statute was this is no different than any other typical executive discretion case. And they held up the statute in ***Marshall Field v. Clark*** which was a tariff suspension statute where the president, upon the determination of three conditions, was to suspend the tariff.

And -- and the Government said the line item veto is no different; you know, the president has to make certain determinations before he can veto, and then, once he does, the veto takes effect.

The grounds that it distinguished the field from the veto statute on first was the executive was not acting on a future contingency, that is, this was -- it was not a situation where Congress had said we don't know what's going to happen in the future, the only way to address this is by giving the executive discretion.

In the line item veto case, the Court said, no, it's -- it's no different, what -- what Congress knew is no different than what the president knew at the time. That's exactly the situation here: Congress knew the facts that the Attorney General knows. This is dealing with already completed surveillance, not what might happen in the future.

So, there is not the requirement of future contingency, which saved the statute in ***Field*** and was lacking in ***Clinton***.

The second factor, and -- was that even if -- under the line item veto statute, even if the president determined that the preconditions for exercising the veto existed, he had no duty to actually exercise the veto. That's exactly the same here. As I said, even if the Attorney General determines that factors (a)(1) -- one of the factors of (a)(1) through (a)(5) exists, he has no duty to file a certification.

And, the third one was they said, well, still, the -- what -- what the Attorney General really is doing is just exercising the -- the policy of Congress. And, they said, well -- the Court said, well, that was true in the tariff statute, but it's not true here, because --

(Cell phone rings.)

MR. WIEBE: -- Congress had existing law and had --

(Cell phone continues to ring.)

MR. WIEBE: I'm sorry, Your Honor.

And had --

(Cell phone continues to ring.)

MR. WIEBE: -- had changed.

(Cell phone still ringing.)

MR. WIEBE: I'm sorry, Your Honor.

(Co-counsel silences cell phone.)

MR. WIEBE: Congress had changed the existing law. And the Court said, no, it's -- it's not a situation where the law had -- had --

(Pause in the proceedings.)

MR. WIEBE: It's not a situation where Congress had made the policy determination, but one where it had deferred it to the Attorney General. And, I think that's exactly the situation here: Congress has not said to the Attorney General, if X is the case, do Y. It's -- it says, X has already happened, the surveillance has already happened, we don't know what to do about it, you decide whether or not there should be liability for it. So it's not gap-filling by the executive addressing a future situation that Congress wasn't able to anticipate.

THE COURT: So you're -- all right, so it's a delegation of legislative authority that you think is problematic?

MR. WIEBE: More than a delegation, really, an abdication of the law-making power and the fact that Congress hadn't made the law here is -- is really the problem under -- under Article 1, Section 7.

THE COURT: All right.

Well, let's move on to some other topics that you want to talk about.

MR. WIEBE: Yes, Your Honor.

THE COURT: You've talked about due process; you've talked about delegation, let's take up the issue of substantial evidence.

In your view, assume for the moment that I conclude that the statute is constitutional, and I follow Mr. Nichols' advice, to look at the Attorney General's certification; what should I look for, in your view? What should I apply as the test to determine whether the substantial evidence requirement of this statute has been met?

I know this is your fall-back position, but I'm sure you have it.

MR. WIEBE: Yes.

Well, I think it depends on the -- on the various certifications. For example, the Government has certified under subsection (a)(5) that there was no content surveillance at all, and we've put in evidence throughout this case, beginning in the very early days, with the Klein and Marcus declarations, Your Honor, showing that there -- there is evidence of dragnet content surveillance.

THE COURT: Well, isn't there a problem with (a)(5) in that, the Attorney General can, essentially, immunize a person, as defined in the statute, a person who did not provide assistance, a person who was not requested to provide assistance? Isn't that a problematic feature of this statute?

MR. WIEBE: I think it is. And I think it is especially --

THE COURT: How is it problematic?

MR. WIEBE: It's problematic, Your Honor, because it -- and this is something that I -- that I believe Your Honor pointed out in your questions, is that it allows (a)(5) to be used as a shield for persons who may have done some of the alleged conduct, but not others. For example, if you have an action alleging both content and records surveillance, both content and records surveillance, and the carrier did one but not the other, presumably, the Government could assert (a)(5) and say, well, not everything that was alleged, occurred, and therefore, they didn't do precisely what was alleged.

Or, if the time period alleged varies from what was -- from what actually occurred, I think Your Honor pointed this out as the ability of (a)(5) to kind of serve as a camouflage or smoke screen for cases where some surveillance occurred, but it doesn't precisely match the allegations of the complaint.

And so, I think that's one respect in which it's -- it's problematic, but, I think, it also illustrates, really, the boundlessness of it, not just under (a)(5), but under -- under all -- all the sections in that, again, the Attorney General has unlimited discretion, even when the circumstance exists to pick and choose whether or not to immunize anyone. And it's -- so, I think that that's certainly problematic.

The --

THE COURT: All right, perhaps you can wrap up?

MR. WIEBE: Yes, Your Honor.

In our briefs, we explain the ways in which the secrecy provisions violate not only the due process provisions, but also the First Amendment, and I think that's a fundamental and independent flaw in this statute. And under -- under both provisions, I think it's crucial to recognize that the Court's control over whether or not information should be secret has been taken out of the Court's hands.

And, the ordinary situation, and the situation that certainly the First Amendment requires, is that the Court have the power to apply the strict scrutiny test, to weigh the Government's interest and find out whether or not it's a compelling interest. If it is a compelling interest with respect to that particular bit of information, then decide whether or not the Government has used the least restrictive means to do it. And, this statute takes all that power out of the Court's hands, and does it perpetually.

As we cite the ***Doe versus Powers*** and ***Doe versus Ashcroft*** cases, that is just a fundamental First Amendment violation.

THE COURT: Is there any sunset provision for this statute?

MR. WIEBE: There is not, Your Honor.

THE COURT: All right.

MR. WIEBE: If I can just point out one last point on the difference between the Government cases and the carrier cases?

THE COURT: Sure.

MR. WIEBE: Is that there are a number of statutes which are specific only to the carriers and not to the Government, where we have no cause of action against the Government at all under 18 U.S.C. 2702; 18 U.S.C. 2511(3)(a); 47 U.S.C. 605; and 47 U.S.C. 222.

THE COURT: Spell that out a little.

MR. WIEBE: Yes.

THE COURT: All these numbers begin to run together after a while.

(Laughter.)

MR. WIEBE: Yes.

Your Honor, this again gets back to the point, I was making earlier, about the carriers being the essential gatekeepers. And, that's something that Congress has recognized, not just with the creation of FISA, but going back to the 1930's, when it enacted 47 U.S.C. 605.

THE COURT: What is that?

MR. WIEBE: That's a statute which prohibits a communications carrier from divulging or disclosing communications that it's carrying to others.

And, these other statutory provisions are similar; they prohibit disclosure, either of content or communications or of records of communications.

THE COURT: All right.

MR. WIEBE: And Congress has historically recognized that the only effective regime of protecting privacy, protecting constitutional rights, is one in which the carriers are directly liable for violating that. And, that's the only system that works.

THE COURT: All right.

MR. WIEBE: Thank you, Your Honor.

THE COURT: Ms. Cohn, if I gave you five minutes, would you care to amplify any particular point that Mr. Wiebe has made?

MS. COHN: I don't think so, Your Honor. I guess the only thing that I would add is that I think that Mr. Nichols' explanation of what should happen next kind of amplifies the due process and secrecy problems here.

THE COURT: How so?

MS. COHN: Well, essentially, what he is suggesting is an ongoing secret process where you do your best, I think, to try to play us, where there is not really an adversarial process, there is a process where they continue in dialogue with you making secret submissions in response to your questions. And this all happens with, I guess, at best, us getting notice that the conversation is going on. But, that doesn't really help me.

THE COURT: Isn't that what the statute contemplates?

MS. COHN: I think that that is one of the reasons the statute is problematic, Your Honor. I think that's why it is a due process problem --

THE COURT: Okay, now --

MS. COHN: -- is that it contemplates, essentially, you know, some kind of a secret process that we don't have any access to and, frankly, that you don't control.

I think there is a second problem here. There are statutes that give you the discretion to decide that, say, there is classified information here and that you're going to decide which information we, as plaintiffs, or I have, to get cleared counsel, get to see.

THE COURT: Well, we are dealing --

MS. COHN: That's different than the statute.

THE COURT: Hold on, hold on.

We are dealing with classified information.

MS. COHN: Some of the information is classified, but it's not clear to me that all of it is.

THE COURT: Oh, as long as some of it is classified that's all it takes, isn't it?

In any event, you are dealing with classified information, and you have to concede, do you not, there is a legitimate Government interest in keeping some information about some Government activities secret?

MS. COHN: Absolutely. Absolutely, but --

THE COURT: And so, how do you deal with a situation where some of that information is necessary for the Court to decide a case that is pending before it?

MS. COHN: Well, I think, you know, the FISA law, provision 1806(f), is a model that does this, where -- I'm sure you are going to be hearing a lot about that statute this afternoon -- but, that is the provision in the FISA law that provides you with the ability to request information and then to decide which of this information should come to us. It's your ability to do it.

802 takes a different tact. 802 basically gives the Attorney General the ability to gag you and takes away your discretion to decide, you know, this isn't secret, this doesn't deserve the level of protection --

THE COURT: If that's --

MS. COHN: You see, in the course of this case --

THE COURT: If that's the determination, if I look at that certification and say, well, wait a minute, this can't possibly be secret, then hasn't the Attorney General failed to meet the substantial evidence standard which the statute requires?

MS. COHN: I'm not sure that the secrecy determination goes to substantial evidence. I guess you could take the position that, if it's not really secret, then you're not going to consider it as evidence, and, therefore, they've failed in their burden. But, I wasn't thinking of those two things as connected.

I mean, whether the evidence is substantial, to me seems to be a separate consideration to whether it is or is not appropriately secret. I didn't read the statute that way.

I guess you could interpret it that way.

(Laughter.)

MS. COHN: But, my thought was -- I guess I was reading the question of whether the evidence was substantial or not to be --

THE COURT: Well, it's --

MS. COHN: -- kind of independent from whether the information that they are submitting to you, or not submitting to you, is appropriately made secret.

You know, for instance, Your Honor, the Klein and Marcus evidence that we have submitted to you long ago, which is still our core evidence that what we say is happening is happening, and the Government has now said under (a)(5) that what we say is happening isn't actually happening, so you have a fundamental decision here, none of that is classified, none of it's secret, the Government has admitted that.

So, I submit that there is a lot of information about what the Government is and isn't doing that is not classified, but that my determination, or even your determination, of which of this information should be -- remain secret and which should not, would be different than that that the Attorney General would take because he wants to win.

THE COURT: Is there any amplification on what the substantial evidence standard is in this statute other than the use of the term in 802 -- let's see, 802(b)(1)?

MS. COHN: I -- I don't think there is any clear information. I mean, we looked to similar --

THE COURT: Well --

MS. COHN: -- statutes.

THE COURT: Is there any information in the statute?

MS. COHN: I believe that there -- there -- I mean, I don't think that the statute itself has anything, but I do need to check with my colleagues on this.

THE COURT: Go ahead, go ahead.

MS. COHN: I have, unfortunately, been in trial for the last five weeks.

THE COURT: Well, then, you ought to be well sharpened for a dialogue with a judge.

(Laughter.)

(Counsel confer.)

MS. COHN: My colleagues confirm my view, which is there isn't anything in the statute to give you guidance about what substantial evidence means here.

THE COURT: Okay, then, to what do I look to determine what substantial evidence means in this statute?

MS. COHN: Yeah, I think the case law is the place to look.

And, you know, we --

THE COURT: Well --

MS. COHN: The particular cases --

THE COURT: There is a lot of case law on substantial evidence.

MS. COHN: There is, Your Honor.

We think that Congress is attempting to do something they can't do, which is to require you to not look at the Attorney General, to basically defer to the Attorney General as if he was another fact finder in front of an adjudicatory process. And plainly, that that is not what happened here. The Attorney General has a position; they have stated their position.

But, for you to be limited in your review of the Attorney General's determination as if he was some sort of an agency fact finder or a lower court finding -- finding of fact, I think would be tremendously wrong.

THE COURT: Yeah, but that's not how the statute is structured, is it? It's not that the Attorney General is acting in an adjudicatory function, he is simply providing evidence to the Court.

MS. COHN: And if the --

THE COURT: The Court is determining whether or not that evidence is substantial.

MS. COHN: But substantial evidence in this context does appear to require you to give a -- to use the more than a scintilla, you know, formulation that we use for a substantial evidence review rather than giving you the right to review the evidence for yourself and make the decision, the fundamental decision, about whether there is sufficient evidence here for us to win or us to lose.

I think it is trying to -- the statute is trying to, I think improperly, to turn you into a version of the appellate review over what the Attorney General does as opposed to your proper role as a District Court, as the fundamental fact finder.

I think it's easiest to see in (a)(5): I mean, whether something did or didn't happen is a classic role for the Court to decide. Litigants come into you, they say oh, I paid him; no, I didn't. It's not, you know -- the Executive Branch doesn't come in and say, well, yes, actually, he did pay them, and you give that substantial evidence review.

The situation here is, I think, Congress is improperly trying to introduce role of the judiciary as a fundamental fact finder here.

THE COURT: They do that all the time, don't they?

(Laughter.)

MS. COHN: Well, certainly not on questions of constitutional facts, and -- which obviously the constitutional claims are at issue here.

THE COURT: We are a court of limited jurisdiction, and Congress can tell us we don't have any jurisdiction in certain kinds of cases --

MS. COHN: They certainly can.

THE COURT: They do it all the time.

MS. COHN: They do it all the time, Your Honor. And sometimes that's a good thing, and sometimes it may not be. But, in this particular instance, where there are constitutional claims at issue, the role of the Court -- you know, what the statute does is fundamentally different than just changing the underlying law. What this statute does is improperly -- Congress didn't change the underlying law, Congress instead empowered the Attorney General to change the underlying law and then, I think, presented a fig leaf to the courts to say, well, and you can look over what they do, and if it's supported by substantial evidence, you must dismiss case.

THE COURT: One last question to you. What's the harm? You still have your claim against the Government. The Government has -- well, until recently, we all thought the

Government had more money than the telecommunication carriers. I'm not too sure --

(Laughter.)

THE COURT: -- that that remains the case. But, in any event, you do have a defendant, and a deep-pocket one, so what's the harm?

MS. COHN: Well, Your Honor, I mean, to a certain extent, I need to echo my colleague, Mr. Wiebe, and maybe I can add a little something: We have a right to an injunction against the phone companies because they are in the unique position of the gatekeeper of the privacy of the millions of Americans. This is as old as -- I mean, the Telecommunications Act statute was passed in the 30's, that creates an independent duty in the phone companies to protect people's privacy.

And that's an important value; it's one that the courts have recognized and that Congress has recognized. And, you know, this is not a situation where the Government is stepping into the shoes of the phone companies and defending on the raft of statutes that set up duties for the phone companies separate from the Government. This is a situation where we always had claims against the Government. We chose a defendant here, and we chose the defendants for, I think, quite, you know, reasonable reasons.

The thicket of immunities that the Government has is different than the defenses that the carriers have. I -- I find it a bit strange to find that situation arises in which our choice of defendant is not being honored by this particular statute or, that we should be told that it's okay, because, you know, you may have sued company A, but it's okay because you can still sue company B. We don't really allow a choice of defendant here.

THE COURT: That's not unusual. You can't sue a judge for a decision the judges makes in the course of performing judicial duties. There are qualified immunities that attach to police officers; there are immunities of all kinds that are supported by very sound public policy justifications.

MS. COHN: Well --

THE COURT: And, isn't that what Congress has done here?

MS. COHN: I don't think so. Congress considered -- and believe me, I would tell you that all the arguments that you have cited today that we should make to Congress are ones that we did, and including Congress considering substitution statute. This was a provision that was considered, and Congress didn't choose to go that road. Congress didn't choose to have the Government step into the shoes of the phone companies. If they did, then I think your question would be a very fair one to ask because in that particular instance the Government would be essentially assuming the duties of the carriers.

But here, the Government is not assuming the duties of the carriers. They are not waving any of their immunities. They are not taking the part of the defendant in a Telecommunications Act statute. There are statutory damages under these provisions that are not available against the Government.

And so, we -- you know, the remedies will change. And, you know, how much they will change and what they will look like against the Government, I think it's a little early to tell. But, they are certainly going to be different, because there are at least five statutes that we sued under that we are not going to be able to sue the Government under now, all of which have some form of a remedy provision, again, most of which are statutory damages, because Congress has traditionally recognized that privacy is a difficult thing to put a number on and instead has put in statutory damages.

But the remedies will change, and, I think they will change dramatically if we are in a position where the cases against the Government are the only ones that go forward. And, I think the questions of the various Government immunities will be a thicket that we are going to have to make our way through on.

You know, I'm not here to tell you that my other case, Jewel, is going to lose, because I think we will win in that situation, too. But, there is a reason that we sued the phone companies first.

THE COURT: All right, don't let me forget about Jewel, I want to talk about that at the end of these proceedings.

MS. COHN: I'd be happy to do so.

THE COURT: All right, now, I want to hear from the telecommunication folks who wanted a rebuttal function. Who's going to do that, Mr. Berenson?

MR. BERENSON: Your Honor, I'm going to address very briefly some of the Separation of Powers issue. I think Mr. Moss will deal with any remaining due process issues.

But we would be happy, both of us, to defer to Mr. Nichols. Looks like he may have a short rebuttal he wanted to do first, if that's all right with you.

We'll do it in whatever order the Court prefers, but I just want to make clear that I don't want to stand in Mr. Nichols' way.

THE COURT: Well, I can understand under the circumstances why you don't want to interfere with the Government's presentation here.

(Laughter.)

THE COURT: All right, Mr. Nichols, you're up.

MR. NICHOLS: I really have just a few points, Your Honor.

You asked at the beginning about whether you should wait for the new administration, and --

THE COURT: Have a different answer to the question now?

(Laughter.)

MR. NICHOLS: No, I don't have a different answer, but I did want to point you to Congress' judgment on this issue, which is --

THE COURT: Okay.

MR. NICHOLS: -- in section 802(a), which says a civil action may not lie or be maintained and shall be promptly dismissed if the Attorney General certifies to the District Court. And, I think Congress' choice of those words is instructive here.

You asked what the next step should be if you were to conclude that the statute was constitutional, what you should do next, and there, I wanted to point you to Section 802(c), which says if the Attorney General files a declaration that disclosure would harm national security, the Court shall review such certification and the supplemental materials in camera and ex parte.

So, on those two questions, I think Congress has mapped out what the Court should do; it should promptly dismiss the cases if it believes the certification establishes that 802(a) has been satisfied, and it shall review the classified certification in making that determination.

Your Honor, the only other thing I wanted to address was this notion of the interplay between 802(a) and cases against the carriers and then cases against Government, because I think the discussion confused, a little bit, plaintiff's claim here. Plaintiff's argument is that the problem with the statute is not that it forecloses statutory or common law claims against the carriers, their argument, and this is, you know, heading one of their brief, is that it forecloses a very specific set of claims, constitutional claims against the carriers.

Those kinds of claims, constitutional claims against the Government, are exactly the kinds of claims they remain free to pursue against the Government. They aren't different claims; they are Bivens, injunctive relief and declaratory judgment relief claims against the Government --

THE COURT: Well, but would they reach conduct with the telecommunications carriers? For example, the plaintiffs may be able to get injunctive relief against the telecommunications carriers that would circumscribe what the carriers can do; is that relief possible in an action against the Government?

MR. NICHOLS: I think, yes, because an injunction could run to the Government that it couldn't seek relief from the telecom carrier. An injunction against the Government either as to a particular activity or a particular set of assistance from a telecom company would preclude the assistance, just in the same way that an injunction running to the telecom company would preclude the assistance.

It's really the flip side of the exact same coin, or order. So, I do think injunctive relief, would, if they get it, afford them all the relief they would be entitled to.

THE COURT: But you couldn't hold Mr. Berenson's clients in contempt, in the way that you could in the event that there were an injunction that lay against his client.

MR. NICHOLS: No, but you could hold the Government in contempt. And, you know, we certainly -- there are -- a lot of what the plaintiffs have said today assumes that the Government would act in bad faith or might not pay a judgment, if one occurred; I mean, if an injunction ran to the Government, that certain activities were unlawful, unconstitutional, and had to be enjoined, I don't see any scenario in which the plaintiffs wouldn't be getting exactly the same relief they would be getting where an injunction ran to a telecom company that says don't provide that assistance.

The Government couldn't, when it received that order, ask for the assistance from the telecom company. They would be enjoined from doing so under penalty of contempt sanctions.

So, I think that the discussion about the carrier, the statutory claims against the carriers not being, you know, something that the plaintiffs can pursue against the Government really doesn't address plaintiff's core argument here, which is that these constitutional claims have been foreclosed. And, for the reasons I mentioned before, we think that that -- that argument just doesn't work.

But, in any event, none of the cases suggest that there is a problem with a policy judgment by Congress that, you know, for good policy, national security, or other reasons, that certain damages remedies wouldn't be available. In the Bivens context, the Supreme Court has recognized many times that it will not recognize a Bivens damages remedy against the Government, even though the result of that is that the plaintiff doesn't get the full relief he is seeking.

That is essentially the plaintiff's argument here, which is, if you dismiss these claims against the carriers, we are not going to be able to pursue all of the statutory claims for relief that we have against the carriers and not against Government.

In addition, Your Honor, I think ***Atmospheric Testing*** in the Ninth Circuit makes quite clear that there is no problem with the regime where claims against private companies essentially become claims against the Government and morph into Federal Tort Claims Act suits, which are subject to a much different set of defenses and doctrines than the underlying common law or statutory claims that have been asserted against the private companies to start with.

So, I think all of those doctrines make it clear that what Congress has done here, which is to say that no claims against the telecom companies, but all claims against the Government remain unaffected by the statute altogether. That is plainly constitutional under the Separation of Powers.

THE COURT: All right.

MR. NICHOLS: Thank you.

Mr. Berenson.

MR. BERENSON: Mr. Nichols hit a number of points that I planned to, so I will try to keep this brief.

I wanted to just amplify on one of the points he made, near the end, about the scope of injunctive relief. It's important to bear in mind that with respect to constitutional claims, those are, by definition, claims against governmental actors.

Remedies against the true governmental actors would almost by definition have to be adequate because, according to the allegations, the private telecom carriers, if they are acting at all here, they are acting at the direction and behest of those governmental actors. And, if those governmental actors are prohibited from doing or ordering a certain thing that the Court finds to be unlawful, then -- then, by definition, that injunction would be effective to prevent the telecom carriers from doing it because the Governmental actor would never be able to get the order in the first place, without being in contempt of court.

There is a principal agency relationship here for the purposes of the effectiveness of injunctive relief. And, as Your Honor also is aware, under the normal rules for injunctions, they often will expressly find parties acting in concert with the principal party enjoined.

So, I don't think there's any question here but that an injunctive remedy for any constitutional violation that might be found, which runs against Government, would be fully adequate to vindicate plaintiff's constitutional rights and interests. Indeed, in the ***Malesko*** case, the Supreme Court went out of its way to note that injunctive relief against governmental actors is, in fact, the principal way, under the scheme of Separation of Powers and under the constitution, that these kinds of rights are vindicated.

The only other two points I wanted to make, one is just a point of correction with respect to the statutory remedies. I fully agree with Mr. Nichols that there are no constitutional implications whatsoever for what may be done with statutory remedies. Congress obviously has plenary power to tailor those remedies and those causes of action, eliminate them altogether. The only constitutional issue that even arises is if a statute attempts to eliminate all constitutional remedies for -- for something that would be a violation.

But, it is important, I think, for the Court to understand that three of the five statutes if I was hearing correctly, that the plaintiffs cited --

THE COURT: You recognized those numbers, did you?

(Laughter.)

MR. NICHOLS: I did, most of them, anyway.

And three of the five actually do contain remedies that run against either the Government itself or Government officials for violation, which, I think, belies the claim of this special gatekeeper function that is so woven into the fabric of these -- of these statutes that no other alternative remedial regime can be contemplated.

What you will see, if you look, is that there are damages available directly against the Government under the Stored Communications Act, Section 2712. There are, as well, damages available against governmental officials under Section 2520 of the Electronic Communications Privacy Act, and 2707 of the Stored Communications Act for -- for intentional violations.

And then, under FISA itself, governmental officials are liable for misconduct. Indeed, I think FISA recognizes that to the extent there are misdeeds involving foreign intelligence surveillance, they are more likely to be committed by Government officials than anybody else, since that's an intrinsically an inherently governmental function. And that you will find in Section 1810 of FISA.

Finally, I wanted to amplify, just a bit, on the ***Atmospheric Testing*** case which Mr. Nichols mentioned in his rebuttal argument. The statute clearly is not of a variety that finds lots and lots of precedents throughout history, but I think I would somewhat take issue with the notion that it is absolutely sui generis. And the ***Atmospheric Testing*** case in the Ninth Circuit from 1987 probably provides the best example, or the closest analogy. That was involving the Atomic Testing Liability Act, which provided that the Government could file a certification, remove and then substitute in any cases where a private contractor was sued for injuries arising out of nuclear testing.

It was entirely within the direction of the Government whether to file that sort of certification. The statute covers all manner of claims, including constitutional claims. It applied to pending cases as well as future cases.

The only reason it's not an absolutely perfect analogy is that the cases, the two cases I'm aware of in which the constitutionality of the Atomic Liability Testing Act were litigated and, in both cases upheld, did not themselves involve constitutional claims. So, the Court was not confronted with the question of whether -- whether it was constitutional to terminate the constitutional remedy against the private actors.

But, because of all of the additional authorities that we have cited in our briefs, I think it's quite clear that they can. As long as remedies against the Government remain, it is not necessary that those remedies be absolutely congruent with the remedies that were available against the private companies. There is abundant authority in the Bivens context and elsewhere for that proposition.

And nor is the scope of executive discretion in any way a constitutional violation. Indeed, in ***Field versus Clark*** itself, which is, I would say, plaintiff's favorite case on the question of executive discretion, the executive actually, in practical terms, enjoyed every bit as much discretion as the Attorney General does here, it just came as a slightly earlier stage.

The standard that the executive had to apply essentially was whether there were unequal and unreasonable tariffs imposed by a foreign government. Obviously, a reasonable standard -- reasonableness standard allows considerable discretion to the Executive Branch to decide when it is, in fact, going to invoke the provisions of the Tariff Act to retaliate.

Now, it's true that once the finding is made, then there is an obligation to act, but whether the discretion occurs at the point at which the Government is making the finding or the point at which it is deciding whether to submit a certification to the Court, I think, doesn't make any difference, from a constitutional perspective.

THE COURT: Very well.

MR. NICHOLS: Thank you very much.

THE COURT: Mr. Moss?

MR. MOSS: Thank you, Your Honor.

The Court has had a number of -- asked a number of questions about the substantial evidence standard and how that applies here.

THE COURT: Can you give us some help?

MR. MOSS: I'm not sure I can provide complete help, but I think I can provide some.

I think first of all, there is agreement among all the parties that there was no adjudication between -- before the agency.

THE COURT: There's no what?

MR. MOSS: No adjudication before the agency. There was not an adjudication which took place before the Attorney General was then subject to review in this context, in the way an administrative proceeding might take place, where there is an APA review in front of the Court after there has been a trial or proceeding before an agency.

I think the parties agree, as well, that there is at least some additional evidence, and there may be disagreement about how much and what type of additional evidence can be submitted to this court.

THE COURT REPORTER: You have --

MR. MOSS: Too fast. I'm sorry.

THE COURT REPORTER: Thank you.

MR. MOSS: So, I think that it's clear that what this Court needs to do is look at the evidence that is presented to it, and, in the context of looking at that evidence, decide whether, in fact, the -- there is a sufficient basis for the Attorney General's certification.

What substantial evidence means and how much evidence is required there is a question that the Court may not need to decide because if the Court looks at the certification and any supporting materials submitted, and any other evidence that the Court deems it appropriate to consider, and concludes that whatever the standard is that applies, whatever substantial evidence may mean here, that the Government has carried its burden; the Attorney General has carried its burden under the circumstances. Then, the Court doesn't need to decide with great specificity what substantial evidence means in this particular statute.

And, I would submit that it is -- that phrase has been given varying definitions and varying statutes and has a number of different meanings they have applied in different contexts. But, as the Court of Appeals held in the ***Kaluna*** case, at 192 F.3d 1188, in a similar sort of context, where the

Court was wrestling with whether a preponderance standard applied, or a clear and convincing standard applied, the Court said it doesn't matter because whichever standard applies, the case comes out the same way.

So if that is true here, then the Court need not ultimately wrestle with the question of what substantial evidence means in this context.

But, I'll tell you what we think it means.

THE COURT: Okay.

MR. MOSS: And what we think it means is that the Court is required to engage in independent review of the evidence, and that, in doing so, it should afford the same type of deference to the Executive Branch that is afforded in other contexts involving national security information and national security.

So, for example, in the FOIA context, there is a recent opinion from the Ninth Circuit where Judge Fisher, writing for the Court, said that, "Under FOIA, where the Court is called upon to assess whether there is an adequate basis for the Government's assertion of protection under the provisions of FOIA that allow exemptions for national security information and affidavits and materials are submitted to the Court that the Court should engage in meaningful, albeit restrained, review of the CIA's assertions."

You know, similarly, Your Honor, in the context of

State Secrets, the courts provide some deference to the assertions of the Executive Branch. There is a case called ***Day*** *(phonetic)* out of the Fourth Circuit -- pardon me, out of the First Circuit -- which we cite in our brief, where the Court talks about providing deference to the executive on matters involving the military in evaluating Westfall certifications. So we think that that's what Congress had in mind. And that's the way the substantial evidence standard ought to apply in this context, assuming that it actually makes a difference.

THE COURT: Meaningful, but restrained review.

MR. MOSS: Yes, Your Honor.

THE COURT: Well, that certainly clears things up.

(Laughter.)

MR. MOSS: I think, Your Honor, on that point, you know, there are a whole host of cases where the Court of Appeals and the Court's, generally, and the Supreme Court have talked -- spoken about providing deference to the Executive Branches. It's not by any means an abdication of the judicial review. And we think that is what applies in the context.

The plaintiffs refer to the ***Concrete Pipe*** case, and I just want to make one, I think, important point about that case, which, I think, is a fundamental distinction between that case and what's involved here. In that case, there was actually a financial interest of the trustee. And what the Supreme Court says is, "A trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust to the exclusion of the interest of all other parties." And, it also went on and said that the trustee himself faced the threat of personal liability for the breach of his fiduciary responsibility, obligations, or duties.

And the courts have made absolutely clear that that type of financial interest in a case is fundamentally different from the type of policy interest or policy perspective that the Attorney General might bring to this context. And, in fact, the more analogous or appropriate case is the ***Withrow*** case, where the Court says that, in general, there is a presumption of integrity and honesty among Government officials.

And, indeed, you know, the Supreme Court in the ***FTC versus Cement Institute*** case said that even where members of the Federal Trade Commission had publicly stated that the challenged pricing at issue in that particular proceeding was illegal that as long as their minds were not irrevocably closed that there was not a due process problem in that context.

Just a couple of words, Your Honor, with respect to the ex parte procedures that Congress provided for. You know, as has been previously noted, there are a number of other contexts where courts have upheld against due process challenge ex parte proceedings, cases in which the interests are fundamentally different and more substantial than in this context.

I mean, for example, under the Anti-terrorist and Effective Death Penalty Act, where someone can be determined to be a terrorist organization which bars them from entering the country, results in the blocking of all their assets and makes it an extremely serious crime for anyone to knowingly provide any material support for them, even in that context, the proceedings can be closed for national security reasons.

Here, I would submit that it's particularly appropriate. And the constitutional issues are diminimus because this is one of the rare circumstances where it's not simply the Executive Branch making a determination with respect to the need for secrecy, either operating under its inherent power or pursuant to a general statute, this is a context in which Congress considered these precise issues presented here. And, under the ***Youngstown*** framework, you have both the Congress and the Executive Branch coming together here and providing that closed proceedings are appropriate, ex parte proceedings are appropriate.

And, it's one that makes sense in this context, in particular, not just given the -- the nature of the national security information at issue, but also, this is a rare case, in which, it's the Government that knows what happened or what didn't happen, that has access to the relevant evidence. It's not like a case involving, you know, somebody who's picked up in Afghanistan, and, you know, thrown into prison, and the

Government says we have reason to think you've done something about bad, and the person says tell me what it is so I can clear it up and I can tell you why that is not the case. You know, maybe I had a conversation with that person, who was a bad person, but I had a legitimate reason to have that conversation. Give me a chance to explain it, but I need to know what that evidence is so I can do it. That's not this context. This is a context in which the Government knows was there a piece of paper? Wasn't there a piece of paper? And present it to a court. So, in that context, the risk of error is diminished, and, therefore, any conceivable due process issue is minimized.

THE COURT: Thank you, Mr. Moss.

Now let's turn briefly, as we conclude, to the Jewel case.

MS. COHN: Your Honor, can I respond very briefly to three --

THE COURT: Well, since you are on your feet I'll let you do that. But, I want to talk to you about Jewel and Mr. Nichols.

MS. COHN: I'm happy to talk about Jewel, but if I could just respond to three things that were said?

First, I think that the protestations that injunctive relief against the Government would, you know, just solve all the problems here and that we don't need injunctive relief against the carriers as well, is somewhat woefully blind of how we got here in the first place.

We got here in the first place because the Government convinced the carriers to do something that was in violation of FISA. That is why it's an immunity law, is because, they -- clearly, the law was broken, here.

THE COURT: Well, let's assume that's correct. Let's assume that's exactly what happened. Then why shouldn't the Government be on the hook for any harm or damage that resulted?

MS. COHN: Well, we are going to try to hold the Government responsible as well, Your Honor, but it took two parties violating the laws, and separate laws, in order to commit this violation. And, we think that it's only right that we should be allowed an injunctive relief against the carriers for their separate behavior here.

You said that no reasonable carrier, telecommunications carrier, in AT&T's position could have thought that what was being asked to do was legal. This was your ruling of, goodness, now, three years ago in July. That's because, I think, you quite rightfully noted that the carriers have an independent duty to protect their customers.

And I think that telling us now, after multiple years of litigation and then going to the Congress to get immunity for their violations of the law, in the past, that we should sit back and it's okay, because an injunction against the Government will protect the millions of Americans whose privacy depends on these carriers keeping their promises of confidentiality, isn't right, and it isn't what Congress did here.

That leads me to my second point, which is a lot of discussion about the ***Atmospheric Testing*** case. That case is about a substitution. That is a situation in which Congress affirmatively substituted the Government in for the private carriers.

The claims didn't -- you know, the claims then morphed, as I think Mr. Berenson said, into claims against the Government, in that instance. Well, our claims don't morph into claims against the Government here, they are extinguished. They die. And the fact that we have a separate cause of action against the Government I don't think makes this like ***Atmospheric Testing***.

The other thing is that Congress -- there was no certification -- there was no discretion in the ***Atmospheric Testing*** case for the Attorney General to decide that the companies that engaged in ***Atmospheric Testing*** were off the hook for claims against them. It was an automatic provision, and it goes back into the Separation of Powers and due process argument that we have talked about here.

The law in ***Atmospheric Testing*** was very different;

it was the Government saying, okay, something bad may have happened here, but we are going to take the heat for it and stepping in affirmatively and making that mandatory, not giving a branch of the Executive the ability to turn that off and on at will. This statutory scheme is very different.

And, I think, it's worth taking a look at that case. And you can see the differences in what happened there. And you can see the differences in the position of the Government's stepping into the shoes of the carriers and not. 2712 is one of the statutes that I -- we mentioned to you, is -- provides relief against the carriers; well, you can look at what would happen if we are trying to bring a similar claim against the Government. Well, first of all, we have to comply with the Federal Tort Claims Act, which has severe restrictions.

THE COURT: Well, let's talk about that case.

MS. COHN: Um-hmm.

THE COURT: That case --

MS. COHN: I know you've been wanting to, so --

THE COURT: Yes, yes.

Why don't you just make that last point, and then let's move on.

MS. COHN: Okay.

I think that the only -- the only other question is about substantial evidence. And I think it's important to know that the statute says that the certification has to be supported by substantial evidence, not that Your Honor is empowered to discern whether substantial evidence exists to demonstrate that (a)(1), (a)(2), (a)(3), (a)(4), (a)(5) has been met.

Congress very specifically created this -- the review that you get to have is the review of the certification, not the review of the activities of the carriers. And, as we mentioned in our briefs, we are quite concerned that the carriers' activities may be quite different in practice or due to some legal analysis or interpretation that is kind of swallowed in the certification, than what the certification indicates.

For instance -- let me see if I can be clear. They have said publicly that for the content claims, the claims that Mr. Klein's evidence supports and Mr. Marcus' analysis supports, that (a)(5) applies, that they are just not doing what we say they are doing. Well, there is a couple of possible reasons for that. One is that they are interpreting what it is we are alleging as something different than what we are actually alleging. Two, is that their certification is based on some legal interpretation of what it is they're doing that is hiding the breadth of what's actually going on.

But, in any event, there is nothing in the substantial evidence standard, at least that I can see, that empowers you to require them to show you what they're actually doing, as opposed to whether their certification says the specific words that it needs to say. And that's a -- that's a troubling difference.

THE COURT: All right.

Jewel.

MS. COHN: Jewel.

THE COURT: Mr. Nichols, I don't believe we have anything that has occurred in the case other than relating it to this litigation.

MR. NICHOLS: I think that's right, Your Honor. I think the parties are in agreement that the Government's response would be due no later than February 2nd. I don't know whether that stipulation has been filed -- oh, we have filed that stipulation. So, our response to the complaint is currently due no later than February 2nd.

THE COURT: All right.

And, let's see, we have -- we have a Rule 16 conference which was set when the case was filed; I don't believe that's been vacated. I wonder whether we really should proceed with that Rule 16 conference, in view of the fact that you are not going to be filing your response until the 2nd of February.

MR. NICHOLS: My view is that we shouldn't have the conference, that we notice whatever motion or whatever step we are going to take on or before February 2nd. And then, the first hearing we have in Jewel would be with respect to -- assuming there is a motion to dismiss or for summary judgment, that we -- that be the first hearing you can conduct in that case.

THE COURT: Well, for planning purposes, what do you think you are going to be doing, moving to dismiss?

MR. NICHOLS: The would be my -- my best guess, Your Honor.

THE COURT: Then we might as well just not set a Rule 16 conference.

Do you agree with that, Ms. Cohn?

MS. COHN: Yes, Your Honor.

THE COURT: All right.

MS. COHN: I would point out that part of the reason for the delay is that we sued some individual Government employees, and there was a process they had to go through to get counsel. That took quite a while, and so, we were --

THE COURT: We don't have appearances by those folks yet.

MS. COHN: No, but we do have representation from the other department at the DOJ that represents the individual people sued that -- anyway, it took them a while to get their ducks in line, and we were trying to be accommodating, so that is why the deadline has slipped out to where it has. But, I think we have now reached agreement on the process. And I agree that a Rule 16 conference doesn't seem to make much sense.

THE COURT: All right.

And the clerk has that scheduled for the 2nd of February, do we?

(Clerk confirming court calendar.)

MR. NICHOLS: That -- Your Honor, just to be clear, February 2nd is the date -- it's the date no later than we will be filing a motion to dismiss, assuming we do that.

THE COURT: Ahh, that's your filing date.

MR. NICHOLS: Excuse me?

THE COURT: That's your filing date.

MR. NICHOLS: Correct, correct.

THE COURT: All right.

MR. NICHOLS: When we file, we'll look to whatever the next relevant date for an argument is thereafter, and we'll notice it in accordance with the Local Rules.

THE COURT: Why don't we pick a date?

MR. NICHOLS: Sure.

For this part, I might have Mr. Coppolino stand up because he is much more likely than I am to be the person advocating on behalf of the Government, so his schedule is going to be a lot more relevant than mine, Your Honor.

THE COURT: How about March 26 for the hearing?

MR. COPPOLINO: Your Honor, I don't have anything scheduled for March 26.

THE COURT: Good. Good.

MR. COPPOLINO: If we do file a motion, we would notice it for that day. And then, the rest of the schedule, I think we can work with the -- the plaintiffs on the schedule working back from that. And perhaps --

THE COURT: That will -- yeah, well, that should give you -- if you file your motion on the 2nd of February, you can adjust the briefing schedule. That will give you significantly more time than you would have under the Local Rules. You can distribute that in any way that looks fair and reasonable. And if you can't work it out, well, I'll give you some meaningful, but restrained review.

(Laughter.).

THE COURT: All right?

Thank you, very much, counsel.

MR. BERENSON: Your Honor, may I have just one moment? I need to make clear on the record something that Ms. Cohn said, in the interest of avoiding confusion, with respect to my client.

I do not believe this Court has ever held that no reasonable carrier in AT&T's position could have believed that what it was asked to do, assuming it was asked to do anything, was lawful. Your Honor's ruling was based solely on the allegations of the complaint so that if AT&T had, in fact, been asked to engage in a boundless content dragnet of the entire population of the United States, that would have been the case. But, there is nothing on the record to suggest that that, in fact, happened or, indeed, that AT&T was asked to do anything by the Government. And, I just wanted to make that clear.

THE COURT: All right, well, I think the record is clear.

MR. BERENSON: Thank you.

THE COURT: Very well.

(Proceedings adjourned at 12:03 p.m.)

---o0o---

CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

December 8, 2008